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Supreme Court of the United States.

OCTOBER TERM, 1935.

Nos. 287, 288, 289, 290 and 316

No. 287 CAMILLE V. TREIGLE, Appellant, v. ACME HOMESTEAD ASSOCIATION, Appellee.

No. 288 CAMILLE V. TREIGLE, Appellant, v. THRIFT HOMESTEAD ASSOCIATION, Appellee.

No. 289 TREIGLE SASH FACTORY, INC., Appellant, v. CONSERVATIVE HOMESTEAD ASSOCIATION, Appellee.

No. 290 TREIGLE SASH FACTORY, INC., Appellant, v. UNION HOMESTEAD ASSOCIATION, Appellee.

No. 316 JOSEPH MITCHELL, Appellant, v. CONSERVATIVE HOMESTEAD ASSOCIATION, Appellee.

Petition of Philip Lutz, Jr., Attorney General of the State of Indiana and Earl C. Bucher, Supervisor of Building and Loan Division of the Department of Financial Institutions of the State of Indiana; Otto Kerner, Attorney General of the State of Illinois and Poyntelle Downing, Supervisor of Building and Loan Associations of the State of Illinois; Edward L. O'Connor, Attorney General of the State of Iowa and C. W. Storms, Auditor of State of the State of Iowa; Clarence V. Beck, Attorney General of the State of Kansas and L. E. Roush, Supervisor of Building and Loan Associations of the State of Kansas; Gaston L. Porterie, Attorney General of the State of Louisiana and J. S. Brock, Bank Commissioner of the State of Louisiana; Roy McKittrick, Attorney General of the State of Missouri and Ira A. McBride, Supervisor of Bureau of Building and Loan Supervision of the State of Missouri; Dan C. Boney, Insurance Commissioner of the State of North Carolina; Howard C. Johnson, Banking Commissioner of the State of Oklahoma; James E. Finnegan, Attorney General of the State of Wisconsin and C. P. Diggles, Supervisor, Building and Loan Division of Banking Department of State of Wisconsin, for rehearing.

JOHN WARREN,
Counsel for above named Petitioners.

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PETITION FOR REHEARING.

Come now Philip Lutz, Jr., Attorney General of the State of Indiana and Earl C. Bucher, Supervisor of Building and Loan Division of the Department of Financial Institutions of the State of Indiana; Otto Kerner, Attorney General of the State of Illinois and Poyntelle Downing, Supervisor of Building and Loan Associations of the State of Illinois; Edward L. O'Connor, Attorney General of the State of Iowa and C. W. Storms, Auditor of State of the State of Iowa; Clarence V. Beck, Attorney General of the State of Kansas and L. E. Roush, Supervisor of Building and Loan Associations of the State of Kansas; Gaston L. Porterie, Attorney General of the State of Louisiana and J. S. Brock, Bank Commissioner of the State of Louisiana;

Roy McKittrick, Attorney General of the State of Missouri and Ira A. McBride, Supervisor of Bureau of Building and Loan Supervision of the State of Missouri; Dan C. Boney, Insurance Commissioner of the State of North Carolina; Howard C. Johnson, Banking Commissioner of the State of Oklahoma; James E. Finnegan, Attorney General of the State of Wisconsin and C. P. Diggles, Supervisor, Building and Loan Division of Banking Department of State of Wisconsin, and present this, their petition for a rehearing of the above entitled causes, and, in support thereof, respectfully show:

1. This Honorable Court's decision in these causes renders impossible the future effective regulation of building and loan associations in the States represented by your petitioners, who are charged with the enforcement of statutes concerning, and the regulation of, such associations in their respective states. It deprives these, and all other States, of their police power to legislate on the subject of withdrawals so as to continue in operation such building and loan associations as exist at the time of such further legislation.

2. The said opinion lays down a rule of law that makes impossible the operation of building and loan associations after any amendment of the statute regulating such association in any fundamental respect, and will force the liquidation of many existing solvent associations which have disbursed large sums under existing amendatory legislation in violation of, what the opinion holds to be, vested contractual rights of members holding shares when the statute was amended.

3. The opinion lays down a rule of law which as a practical matter makes it impossible for associations to continue in business after amendment of the withdrawal statute of their States. As a result of this decision, shareholders in Louisiana who acquired their shares prior to

the 1932 statute challenged in these causes, have a contractual right to withdraw in accordance with the statute (or perhaps the by-laws), in force at the time of their subscriptions for shares, and shareholders who acquired their shares after the 1932 statute have contractual rights to withdraw and be paid in accordance with that statute. It is probable that in the future, in a solvent association of that State, applications for withdrawals will be filed by the former class of shareholders and unpaid for sixty days, which exceed in amount one-half of the receipts of the association in any month, and that in the same month there will be on file and unpaid for sixty days, applications for withdrawal by those to whom shares were issued after the enactment of the 1932 statute, in an amount equal to that of the former class. It is also probable that the order of filing of such notices will vary, some of the latter class preceding some of the former class. Assuming the available funds in a given month (at least one-half of receipts) to be $10,000.00 and the withdrawals of each class to be $20,000.00, it is apparent that it would be impossible for the association to reconcile and accommodate such slashing legal claims to the same fund or fulfil its obligation to one class or any of the class, in accordance with its vested contractual rights, without violating its contract obligations to the other, hence liquidation must ensue.

4. If the opinion holds that withdrawal is a vested contractual right acquired from the by-laws, it will have set back the social service of these institutions to the times preceding the start of this century. Withdrawal was there, a matter of private contract, being regulated by by-law provisions in each association. It is an historical fact that the appeal of the building and loan plan to the poor, who could save but little at a time, was seized upon by promoters who, calling their associations mutual and attempting to similarize their outward appearance to that of the local mutual associations, by high pressure salesmanship

which concealed the harsh terms of contracts, induced many poor people of various States to invest and lose their savings.

Common features of the withdrawal rights under such by-law contracts were (a) an absolute prohibition against withdrawal or a prohibition against withdrawal before a stated number of years, (b) the forfeiture of all savings in the event of a delinquency for a stated period, (c) high membership and withdrawal fees, paid to salesmen and officers and paid out of the first savings of the member so that the first ten or twelve months' dues were used for such purpose, the members so saving getting no credit for such savings, (d) forfeiture of profits credited to such shares and, frequently, a deduction for an expense fund which substantially impaired the savings being repaid.

The situation was akin to that then obtaining in the insurance business, which resulted in the enactment by the various States of legislation prescribing the language of policies, and, for the same reasons which motivated States to so legislate, they likewise enacted legislation on the subject of withdrawal to protect the savings of their citizens and to force mutual and local operation of building and loan associations for the benefit of the shareholders and drive out of their respective States the nationally operated associations, which were, while mutual in name, operated for the benefit of the management, and chiefly responsible for unsocial withdrawal practices.

Such statutes, with many limitations and restrictions to effectuate and safeguard the withdrawal privilege, accomplished their objective at that time and forced the nationally operated associations out of business, insured the safety and profit of savings in truly mutual local associations and the prompt payment of withdrawals, in contemplation of real estate and employment conditions at that time. As different economic conditions developed the States amended their withdrawal statutes from time to

time to meet such conditions and to preserve equality and mutuality amongst members of associations.

The opinion in these causes recognizes the right of the States to regulate building and loan associations under the police power but enunciates a view that withdrawal is a matter of private contract between the members *inter sese* and is not a proper public matter permitting regulation under such power. We respectfully submit that this is error and that as shown above the States have properly legislated upon this subject as an exercise of the police power, for the purpose of protecting their citizens and developing these institutions of community thrift and home finance as social and economic factors and that it has been universally held that building and loan associations are subject to regulation by the States under their inherent police power and, likewise, that under such power, statutes regulating the withdrawal privilege evidence a public policy which can neither be waived nor contracted away. They are police regulations in which no one has a vested right and which may be repealed or modified at the will of the State.

5. Your petitioners most respectfully submit that it is impossible for them to determine from the opinion herein whether the vested contractual right stated, therein acquired by a member at the time of his subscription for shares, is acquired by virtue of the statute then in force, or by virtue of the by-laws then in force. If it be the latter, then we must humbly submit that the Court has erred, for by-laws, which in this case differed from the statute in force at the time of the subscription for shares, could not give rights to members then subscribing, for by-laws cannot be in derogatioon of the statute, and when the State has legislated under its police power upon the subject of withdrawals, such legislation controls the privilege and nullifies any prior by-law provisions upon the subject. Thereafter, withdrawal is a privilege flowing

from such statute. This being the undoubted law, no contractual rights, under prior enacted by-laws, can be given to a member subscribing for shares while such statute is in force, where such by-laws do not accord with the statute or under by-laws then enacted which do accord with the statute, for the privilege exists by virtue of the statute alone even though there be no by-law on the subject. To otherwise hold would enable parties to contract in total disregard of the statute and thus oust the State of its right and ability to exercise its police power. And a by-law repeating the statute, while informative to members, is a nullity, and such a by-law does not give to a member any right of withdrawal. He already has the withdrawal privilege provided by the statute and there is no consideration for any obligation of the association under such by-law.

6. As to the statutes, set forth in the appendix of appellee's brief, rearranging the allocation of funds for and the order of payment of withdrawals, it is submitted that they were all enacted in the viewpoint of the Legislators of the respective States for the purpose of accommodating the withdrawal privilege to the economic conditions of the present day and in order to enforce mutuality under existing circumstances. The essential and fundamental feature of building and loan associations is perfect equality and mutuality. This is the fundamental law of these institutions, in the light of which all statutes, all by-laws and all contracts must be read. The courts have continuously struck down all features which were non-mutual or created preferences as violative of this fundamental law, and withdrawal itself, is subject to it, for it has always been held (1) that the privilege of withdrawal presupposes that upon withdrawal that there will be a relative portion of the assets left for continuing members, (2) that statutes providing for the withdrawal privilege are inoperative once the association is in fact insolvent, (3)

that contracts for the payment of withdrawals in violation of the statute are preferential, violative of public policy and void, (4) that in those few States where suits for withdrawal may be instituted upon the maturity of the withdrawal notices, a judgment for withdrawal does not change the status of the withdrawing member, who can obtain no preference over his fellow members by virtue of such judgment, (5) that on liquidation, the law applied is that of perfect equity, and, consequently, judgments for withdrawal, matured withdrawal notices and matured shares, which have been obtained and matured during the solvency of the association, have no preference on liquidation, and the holders thereof continue to be members and stand in *pari passu* with the unwithdrawn and unmatured shareholders, the distribution being pro rata to all.

7. Section 53 of the challenged statute which changed the order of payment in the event that withdrawals could not be paid in sixty days, from an order of payment in full to a payment of 25% on a rotary basis each time the withdrawal was reached and providing that under certain circumstances, the Commissioner may order the available funds pro-rated over all withdrawals, is a product of the times and occasioned by unemployment producing an unprecedented number of withdrawals at the same time it is making impossible for home owners to keep up their payments on their mortgage obligations, resulting in foreclosure and the acquisition of unsaleable real estate by associations. Unemployment also produced a cessation of new share subscriptions. The fundamantal law of the institution heretofore mentioned, requires that all members equally participate in assets. Thus associations became unable to meet all of their withdrawal requests within a reasonable time with an indefinite prospect as to ability to pay all withdrawals. New withdrawals were the result of frightened but not needy members, filing applications to obtain preferential payments. The payment of

funds available for withdrawals under these circumstances, in full to withdrawing members, in the order in which applications therefor were filed, would result in the payment to the wide awake insiders and their friends in full, in cash, leaving the more humble outsiders who might later withdraw, unable to obtain payment of their withdrawals until such time as a change in economic conditions would permit of the liquidation of the real estate. Consequently, this section of the challenged statute merely emphasizes the fundamental law of the institution, for it provides for equal participation in, and distribution of, assets in kind, a distribution of available cash proportionately to all the members in need thereof. This is a proper subject for a legislative enactment, for it protects, emphasizes and provides for the required equal participation in assets.

8. As the Court views withdrawal as a matter of contract, we respectfully submit that the amendable statute upon the subject, at the time of subscription is, by virtue of the authorities, a component part of the membership contract. All contracts are amendable and a contract which contains as a component part, an amendable statute evidencing a public policy, is itself amended by an amendment of that statute in the further exercise of the State's police power and such amendment of the statute as it amends the contract, cannot be deemed to involve its violation. Surely the statutory withdrawal privilege is an important inducement to membership in these associations. Members who subscribed for shares in contemplation of such statute, knew that it might be further amended and must be deemed to have contracted accordingly and with the knowledge that, if new economic conditions require a new public policy upon the subject, that the State had the right to amend the statute by enunciation of a new public policy for the benefit of the members who had subscribed for shares under the prior statute and, that they would be bound by such amendment.

9. Building and loan associations are the creatures of the building and loan statutes (which are enacted under the police power and enunciate the public policy of the State upon the subject) incorporated to effectuate the public policy of such statutes. All shareholders are members acquiring their withdrawal privileges under the statute empowering the association. They are thus charged with knowledge of the powers and limitations of the association of which they are a component part. They cannot complain of the obedience of the association to the mandate of the statute in force for the time being, and evidencing the public policy of the State for the time being, for public policy is known to them to be a changing thing differing in different times, under different circumstances.

10. While there is contrariety of decision on the subject, there is substantial, and we think, the weight of, authority in favor of the proposition that where there has been no statute enacted concerning withdrawals, that by-law amendments concerning such subject postponing the time of, allocating limited funds for, and providing for an order of payment of, withdrawals or permitting the payment of small shareholders without regard to the withdrawal list, are not violative of vested rights under prior by-laws and are procedural amendments regulating the time, but not impairing the quantum of the recovery. So too, the challenged Section 53 is procedural and is prospective in its application for it mandatorily limits the association as to its future disbursement of funds.

11. The opinion makes note that the challenged sections of the statute do not concern the preservation of solvency or the distribution of assets, but this we submit, is wrong, for withdrawal in itself is a distribution of assets, for on withdrawal, there is paid to the withdrawing member the value of his proportionate share of such assets. And all of the sections which are challenged are designed not only to preserve the mutual rights to a proportionate distribu-

tion of assets in kind, but are likewise designed to prevent future, and induce the cancellation of present, withdrawals, as a careful reading of them will disclose. They have a direct bearing on the conservation of the assets of the association and their preservation as functioning agencies of home finance and systematic thrift and the prevention of their practical liquidation.

12. The Court likewise said that this was not emergency legislation, but the Court below sitting in the State of Louisiana, took judicial notice of existing conditions there, which, in its opinion, justified the legislation, and besides, Section 53 meets the tests of emergency legislation, for it is effective only in an emergency and limited to the time of the emergency. The challenged section does not, when associations are in liquid condition and able to pay all withdrawals within sixty days, as is the usual condition in normal times, make any change in the payment of withdrawals. They are still to be paid in the order of filing and in full, but it is only when an association by reason of emergent condition becomes unable to pay withdrawals in that order, in that time, that the amendment becomes effective as to that association. Thus it takes effect only upon an emergency affecting a particular association and the rotary basis of payments or the pro rata basis of payments permitted and required by such amendment are to be followed only so long as the emergency affecting that particular association exists, and when it passes, the old order of payment in full again is required.

For the foregoing reasons, it is respectfully urged that the challenged statutes do not violate the obligation of appellants' contracts or due process and that this petition for a rehearing be granted and that upon such rehearing, your petitioners and such similar officials of other States who may desire to join petitioners, as *amici curiae,* be permitted to file a brief and to argue the case, for the limita-

tions of the rules of this Court do not permit the citation in this petition of the wealth of authority and the reasons sustaining the rules of law herein stated. The States whose statutes are affected by the decision herein, have not been heard. As hundreds of millions of dollars have been paid out under statutes in principle similar to those herein struck down, which the States have enacted for the purpose of protecting their citizens whose savings and homes are involved, they should, we respectfully submit, have an opportunity to be heard in defense of their statutes and of their rights to enact the same to effectively protect the savings of their citizens invested in the building and loan associations of their respective States and to protect and preserve such institutions so as to continue their effective local, mutual, community, social and economic service.

Cases involving the constitutionality of amendatory withdrawal statutes are pending in other States, whose constitutions may differ from that of Louisiana which statutes differ in some respects from the statutes of Louisiana here challenged and numerous other suits are threatened. As has been heretofore pointed out, the decision herein is not entirely clear, and it is to be anticipated that unless a rehearing herein is granted, and the rule of this Court distinctly enunciated, that there will be other appeals to this Court involving the constitutionality of other amendatory building and loan statutes.

We pray a rehearing in order that the judgment of the Louisiana Supreme Court be upon further consideration, affirmed.

Respectfully submitted,

JOHN WARREN,

Counsel for Philip Lutz, Jr., Attorney General of the State of Indiana and Earl C. Bucher, Supervisor of Building and Loan Division of the Department of Financial Institutions of the State of Indiana; Otto Kerner, Attorney General of the State of Illinois and Poyntelle Downing, Supervisor of Building and Loan Associations of the State of Illinois; Edward L. O'Connor, Attorney General of the State of Iowa and C. W. Storms, Auditor of State of the State of Iowa; Clarence V. Beck, Attorney General of the State of Kansas and L. E. Roush, Supervisor of Building and Loan Associations of the State of Kansas; Gaston L. Porterie, Attorney General of the State of Louisiana and J. S. Brock, Bank Commissioner of the State of Louisiana; Roy McKittrick, Attorney General of the State of Missouri and Ira A. McBride, Supervisor of Bureau of Building and Loan Supervision of the State of Missouri; Dan C. Boney, Insurance Commissioner of the State of North Carolina; Howard C. Johnson, Banking Commissioner of the State of Oklahoma; James E. Finnegan, Attorney General of the State of Wisconsin and C. P. Diggles, Supervisor, Building and Loan Division of Banking Department of State of Wisconsin.

Certificate of Counsel.

I, JOHN WARREN, Counsel for the above-named petitioners for rehearing, do hereby certify that the foregoing petition for a rehearing of the above entitled causes is presented in good faith and not for delay.

JOHN WARREN,

Counsel for Philip Lutz, Jr., Attorney General of the State of Indiana and Earl C. Bucher, Supervisor of Building and Loan Division of the Department of Financial Institutions of the State of Indiana; Otto Kerner, Attorney General of the State of Illinois and Poyntelle Downing, Supervisor of Building and Loan Associations of the State of Illinois; Edward L. O'Connor, Attorney General of the State of Iowa and C. W. Storms, Auditor of State of the State of Iowa; Clarence V. Beck, Attorney General of the State of Kansas and L. E. Roush, Supervisor of Building and Loan Associations of the State of Kansas; Gaston L. Porterie, Attorney General of the State of Louisiana and J. S. Brock, Bank Commissioner of the State of Louisiana; Roy McKittrick, Attorney General of the State of Missouri and Ira A. McBride, Supervisor of Bureau of Building and Loan Supervision of the State of Missouri; Dan C. Boney, Insurance Commissioner of the State of North Carolina; Howard C. Johnson, Banking Commissioner of the State of Oklahoma; James E. Finnegan, Attorney General of the State of Wisconsin and C. P. Diggles, Supervisor, Building and Loan Division of Banking Department of State of Wisconsin.